Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

BRUCE ROY LEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 844(h), which provides that "[w]hoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years," applies to a conspiracy to burn a cross in order to threaten or intimidate individuals in their exercise of rights secured by federal law.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 935 F.2d 952, and is set forth in the appendix to the petition in No. 93-7412 (Lee Pet. App.) at A19-A27. The order of the court of appeals vacating the panel opinion in part and granting rehearing en banc (Lee Pet. App. A18) is unreported. The en banc opinion of the court of appeals (Lee Pet. App. A2-A17) is reported at 6 F.3d 1297.

JURISDICTION

The judgment of the panel was entered on June 10, 1991. The judgment of the court of appeals upon rehear-

ing en banc was entered on October 7, 1993.[1] On December 30, 1993, Justice Blackmun extended the time for filing a petition for certiorari to and including February 4, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 844(h) provides that "[w]hoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years."

STATEMENT

1. Respondent Bruce Roy Lee constructed and burned a cross in a field adjacent to the Tamarack Apartments in Coon Rapids, Minnesota. Lee Pet. App. A20-A21. Lee's girlfriend Debbie Dockter resided at the apartment complex. Approximately 15 black families lived in the complex. *Id.* at A21. One of these was Pearl Jones and her family, who lived in an apartment above Dockter. *Ibid.* Jones's son was rumored to have assaulted a white child. *Ibid.* Werner Jahr, who had read an article about the Ku Klux Klan, suggested the cross-burning, and Lee agreed that it was a good idea. *Ibid.*

Lee constructed the cross. Later that day, he told Dockter's sister that he intended to burn the cross to "do something about" problems with a black family upstairs. Lee Pet. App. A21; Tr. 144, 162. Jahr suggested to a neighbor that it was time to "take a stand against all the beatings that the white kids are taking from the blacks here" (Tr. 279), and that "the whites should start

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[1] Although the court of appeals did not grant rehearing en banc as to the issue presented in this petition, we believe that the petition is timely filed. See note 2, *infra*.

standing up against the blacks there to try to get rid of them." Tr. 280. That night, Lee soaked the cross in mineral spirits and set it on fire on a hill across from the apartment building in which Dockter and the Joneses lived. Lee Pet. App. A21. The cross burned only briefly, but Dockter and Cathy Jahr (Werner Jahr's wife) called the police and fire departments because they were afraid the cross was going to set the field afire. Tr. 105-106, 154. Lee expressed his disappointment that the cross had not burned longer. Lee Pet. App. A21.

The burning cross was visible from the apartment building (Tr. 169), where it was seen by Pearl Jones and her family and friends, including several children. Lee Pet. App. A21; Tr. 189-191, 225-226, 231-234. Jones said to others observing the cross from her apartment balcony that she "hope[d] they don't come up here and burn us up." Lee Pet. App. A21; Tr. 191. She testified at trial that she was afraid and that seeing the cross made her think of the Ku Klux Klan, "people[] that hate blacks." Lee Pet. App. A21. Jones's twelve-year old daughter Angie was very frightened by the cross-burning. Tr. 191, 196, 225-228. She was afraid that "somebody would come up in the hall and take us away" (Tr. 227-228), and asked her mother if someone would "come upstairs and set us on fire while we were sleeping." Tr. 196. The other children in the apartment also were frightened and asked if someone was going to come and hurt them. Tr. 234-235. Pearl Jones believed that the cross-burning was directed at her. Tr. 197; see Tr. 252-253.

Lee subsequently told a neighbor that he had participated in the cross-burning, and that the burning cross "represented the klan, the symbol of the klan." Lee Pet. App. A21; Tr. 288. Lee said that he had burned the cross "to take a stand" and said that "[m]aybe that would get rid of some of the bad blacks that were there, they would

take the message seriously and leave." Lee Pet. App. A21; Tr. 288. Werner Jahr testified at trial that he recognized burning a cross as "a racial act" symbolizing "[v]iolence towards blacks." Tr. 94. He said that the cross was burned not only "[t]o make a statement" but also to frighten and threaten the blacks living in the complex (Tr. 110, 131), and that he wanted the blacks to move out. Tr. 134-135.

2. Lee was charged with felony conspiracy to threaten or intimidate individuals in their exercise of federally guaranteed rights in violation of 18 U.S.C. 241 (Count I), interference with housing rights through force or threat of force in violation of 42 U.S.C. 3631(a) (Count II), and use of fire in the commission of a federal felony in violation of 18 U.S.C. 844(h)(1) (Count III). Lee Pet. App. A20. After a jury trial, Lee was convicted on Counts I and III and acquitted on Count II. *Ibid.* On May 18, 1990, Lee was sentenced to imprisonment for a term of 21 months on Count I. As required by 18 U.S.C. 844(h)(1), he was also sentenced to 60 months' imprisonment on Count III, with three years of supervised release following imprisonment. Lee Pet. App. A20 n.2.

3. On appeal, a panel of the court of appeals affirmed Lee's conviction on Count I (Lee Pet. App. A21-A25), but reversed on Count III, holding that Lee "did not use fire to commit a felony within the meaning of 18 U.S.C. § 844(h)(1)." Lee Pet. App. A25. Until 1982, Section 844(h)(1) prohibited only the use of an explosive in the commission of a federal felony. With the enactment of the Anti-Arson Act of 1982, the statute was amended to cover the use of fire as well. After examining the legislative history, the panel found that the purpose of the 1982 amendment was "to facilitate the prosecution of arson" (Lee Pet. App. A25, footnotes and citations omitted):

> The amendment was intended to remove the obstacle of proving the prior requirement that the damage caused by arson was caused by means of an "explosive." There is no indication that the amended statute was intended to apply to facts such as those before us. Lee did not commit arson, nor did he damage persons or property by the use of fire.

Applying the "rule of lenity," the panel concluded: "Because we are left to guess as to whether Congress intended § 844(h)(1) to apply to facts such as these, we must reverse." Lee Pet. App. A25 (citing *Bifulco* v. *United States*, 447 U.S. 381 (1980)).

4. Lee filed a petition for rehearing with suggestion for rehearing en banc, contending that the panel had erred in rejecting his First Amendment challenge to his conviction on Count I. The United States opposed the petition but asked the court of appeals to review the panel's reversal of the Count III conviction if it decided to rehear the case. Lee Pet. App. A4. The Eighth Circuit granted rehearing en banc "as to Count I only" and vacated the panel opinion and judgment "as it pertains to Count I." Lee Pet. App. A18.[2]

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[2] The instant petition seeks review of the panel decision, issued on June 10, 1991, as to the applicability of 18 U.S.C. 844(h)—an issue on which the court of appeals did not grant rehearing en banc. We believe that the petition is timely filed. Rule 13.4 of the Rules of this Court states that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." The Rule does not establish a different deadline when a petitioner seeks review of aspects of a panel's holding that are not encompassed within the grant of re-

Upon rehearing en banc, the court of appeals reversed Lee's conviction on Count I and remanded for retrial. Lee Pet. App. A2. On January 4, 1994, Lee filed a petition for certiorari seeking review of that ruling. *Lee* v. *United States*, No. 93-7412. The United States expects to oppose Lee's petition.

DISCUSSION

Section 844(h)(1) of 18 U.S.C. provides that "[w]hoever * * * uses fire * * * to commit any felony which may be prosecuted in a court of the United States," shall be subject to a mandatory minimum sentence of five years imprisonment in addition to the sentence imposed for the underlying felony. The Eighth Circuit's ruling that 18 U.S.C. 844(h)(1) does not apply to cross-burning prosecutions squarely conflicts with the judgment of the Seventh Circuit in *United States* v. *Hayward*, 6 F.3d 1241, 1248 (1993). The ruling is also inconsistent with this Court's intervening decision in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), regarding the meaning of the word "use" in a similar statute involving the use of firearms in the commission of a crime of violence or drug trafficking.

1. In *Hayward* the Seventh Circuit considered the claim, accepted by the Eighth Circuit panel in the instant case, that "section 844(h)(1) does not apply to [cross-burning cases] because Congress intended the statute only for the prosecution of arson cases." 6 F.3d at 1245. The court rejected that contention, concluding that "[t]he language of the statute does not limit itself to the prosecution of arson cases." *Id.* at 1246. Rather, the court held, the statutory language clearly and unam-

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hearing. Nor would it be wise as a matter of judicial administration to split the case in such a fashion.

biguously encompasses cross-burning. *Id.* at 1246-1248. The court acknowledged that the Eighth Circuit panel in the instant case had reached a contrary result. It stated, however, that "because the *Lee* court bypassed the clear and unambiguous language of section 844(h)(1), we reject its determination that section 844(h)(1) does not apply to cross burnings done to violate another's civil rights under 18 U.S.C. § 241." *Id.* at 1248.

The defendants in *Hayward* have filed a petition for certiorari seeking review of the same question presented by this petition. *Hayward* v. *United States*, No. 93-1063. Because the circuits are squarely in conflict and the issue is one of continuing importance for the enforcement of federal civil rights laws, we believe that the Court should grant certiorari in *Hayward* to resolve this question. The instant petition should be held pending this Court's disposition of *Hayward*.

2. Should the Court deny the petition for certiorari in *Hayward*, we suggest that it grant the instant petition, vacate the judgment of the panel with respect to Count III of the indictment, and remand for further consideration in light of *Smith*. In *Smith*, the Court examined 18 U.S.C. 924(c)(1), which provides a mandatory minimum sentence when a defendant "during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm[.]" As the Court found in *Smith*, the "every day meaning" of the term "use" includes "to convert to one's service," "to employ," "to make use of," "to avail oneself of," "to utilize," "to carry out a purpose or action by means of." 113 S. Ct. at 2054, quoting *Webster's New International Dictionary of the English Language* 2806 (2d ed. 1949); *Black's Law Dictionary* 1541 (6th ed. 1990). Here, Lee clearly "use[d]" fire in the commission of a federal felony in the sense

that he "utilize[d]" or "employ[ed]" fire to burn the cross in violation of 18 U.S.C. 241. His "purpose or action" was to threaten the Jones family in the exercise of their federally guaranteed housing rights in violation of 18 U.S.C. 241. He plainly "carr[ied] out" that purpose "by means of" fire.

The decision in *Smith* postdates the panel decision in the instant case. This Court may therefore wish to resolve the circuit conflict by directing the Eighth Circuit to reconsider its prior interpretation of Section 844(h) in light of *Smith*.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Hayward* v. *United States*, No. 93-1063. If the Court does not grant certiorari in *Hayward*, we suggest it grant the instant petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993).

Respectfully submitted.

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Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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United States of America, Petitioner,

vs.

Bruce Roy Lee, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals en banc dated October 7, 1993, is reported at 6 F.3d 1297. Lee Pet. App. at A-2 to A-17.[1/] The panel opinion of the Eighth Circuit Court of Appeals dated June 10, 1991 is reported at 935 F.2d 952. Lee Pet. App. at A-19 to A-27.

JURISDICTION

Petitioner Bruce Roy Lee was convicted and sentenced for violating 18 U.S.C. §844(h)(1) on May 18, 1990 by the United States District Court in Minnesota. Lee Pet. App. at

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1/ Respondent filed a Petition for Certiorari on January 4, 1994 in which he seeks review of the First Amendment aspects of this case. See, Bruce Roy Lee v. United State of America, No. 93-7412. The above citation is to the Appendix filed in that case.

A-28 to A-31. The Eighth Circuit reversed Lee's §844(h)(1) conviction on June 10, 1991. On August 14, 1991, the Eighth Circuit en banc rejected the United States' suggestion for rehearing of the panel's reversal of the §844(h)(1) conviction. Lee Pet. App. at A-18. On December 21, 1993 the United States requested and was granted an extension of time to petition for certiorari to February 4, 1994. Its Petition was filed February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

Section 844(h) provides that "[w]hoever . . . uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years." 18 U.S.C. §844(h) (1988).

STATEMENT OF THE CASE

Respondent Bruce Lee burned a cross on August 11, 1989 in a field behind the Tamarack Apartments in Coon Rapids, Minnesota. Co-defendant Werner Jahr and Lee's girlfriend,

Debbie Dockter, were residents of the Tamarack Apartments. T.84.[2/]

Jahr and Lee decided to burn a cross "to make a statement" in response to racial tension at the Tamarack Apartments. T. 92, 95, 110. They made a cross out of scraps of 2 x 4 lumber. T. 87. The cross was burned on a small hill in an open field about 386 feet behind the apartment complex. T. 128, 269. The cross never fully ignited and only burned for 30 to 60 seconds. T. 104, 128.

Mr. Lee was charged with conspiracy to violate civil rights in violation of 18 U.S.C. §241 (Count I), interference with housing rights by means of force or the threat of force in violation of 42 U.S.C. §3631(a) (Count II), and the use of fire in the commission of a felony in violation of 18 U.S.C. §844(h)(1) (Count III). Mr. Lee was convicted on Counts I and III, and acquitted on Count II. Lee Pet. App. A-28. Mr. Lee appealed his conviction on Counts I and III.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed the Count I conspiracy conviction but reversed the Count III conviction for using fire in the commission of a felony. Lee, 935 F.2d at 953; Lee Pet. App. at A-19. The government's Petition for Rehearing on Count

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2/ "T." refers to the transcript of the trial in District Court.

III was denied. Lee, 6 F.3d at 1299; Lee Pet. App. at A-18. On rehearing en banc, the Eighth Circuit reversed the Count I conviction and remanded for a new trial with new jury instructions. Lee Pet. App. A-1.

The Solicitor General sought and was granted an extension of time to February 4, 1994 to petition for a writ of certiorari. United States Pet. App. 1. On February 4, 1994, the United States filed its Petition seeking review of the June 10, 1991 final judgment reversing Lee's Count III conviction. Meanwhile, on January 4, 1994, Bruce Roy Lee filed a Petition for Writ of Certiorari regarding the First Amendment aspects of the case (No. 93-7412).

ARGUMENT

The United States' Petition for Writ of Certiorari in this matter should be denied for several reasons.

1. The United States' Petition is not timely. Supreme Court Rule 13.1 requires that a petition for writ of certiorari be filed "within 90 days after the entry of the judgment." When a party requests rehearing in the appellate court, the time for petitioning "runs from the date of the denial of the petition for rehearing." Supreme Court Rule 13.4. "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." Supreme Court Rule 13.3.

Here, the Eighth Circuit panel reversed Lee's §844(h)

conviction on June 10, 1991. On August 14, 1991, the Eighth Circuit ordered that "rehearing en banc . . . is granted as to Count I only," and vacated the June 10, 1991 opinion and judgment "as it pertains to Count I." Lee Pet. App. A-18. The final judgment regarding Count III was thus the Eighth Circuit panel's June 10, 1991 decision reversing Lee's conviction. The United States had 90 days after its petition for rehearing was denied on August 14, 1991 to petition for writ of certiorari regarding the Eighth Circuit's disposition of the §844(h) count. It neither timely filed a petition nor sought an extension of time in which to file. The United States did not file a petition on this question until February 4, 1994, over two and one-half years after final judgment was entered.

Petitioner argues that the above-quoted portion of Rule 13.4 does not apply when review is sought of "aspects of a panel's holding that are not encompassed within the grant of review." This is a misstatement of Rule 13.4. The rule clearly provides that the time for petitioning "runs from the date of the denial of the petition for rehearing." Supreme Court Rule 13.4. The Eighth Circuit denied the government's petition for rehearing Count III on August 14, 1991. Petitioner's argument that it would not be "wise" to "split" this case has no merit. The Solicitor General could have avoided "splitting" the case by making a motion to stay

the appellate court proceedings while it made a timely petition to the United States Supreme Court. This would have both facilitated the "wise judicial administration" of the case and satisfied the timing requirements of Rule 13. The United States' February 4, 1994 Petition should be denied because it is jurisdictionally out of time.

2. The United States' Petition should also be denied because the Eighth Circuit correctly decided the issue. Construing §844(h)(1) as proposed by petitioner would lead to the absurd result of enhancing Lee's sentence by five years merely because, in exercising his free speech rights, he ignited two scraps of 2 x 4 lumber that burned for less than one minute. See, e.g., Ashley Drew & Northern Railway v. United Transportation Union, 625 F.2d 1357 (8th Cir. 1980) (reasoning that it is inappropriate to adhere to a literal reading of a statute when absurd consequences result); but see, United States v. Hayward, 6 F.3d 1241, 1246, n.6 (7th Cir. 1993) (recognizing that a five-year enhanced penalty for cross burning is "stern" but not so "outlandish that Congress could not have intended it"). The Eighth Circuit properly looked to the legislative history of §844(h)(1) to determine Congress' intent in amending the statute.

Section 844(h)(1) was amended by the "Anti-Arson Act of 1982" to make it easier to prosecute arson by removing

the requirement of proving that the source of damage was an "explosion." Lee, 935 F.2d at 958 (citing H.R. Rep. No. 678, 97th Cong., 2d Sess. 1-2, reprinted in 1982 U.S.Code Cong. & Admin.News 2631-32; United States v. Fiore, 821 F.2d 127, 131 (2d Cir. 1987)). The cross burning here was not arson, nor did it damage anything but the scrap lumber used to build the cross. Id. The Eighth Circuit properly decided that it was unclear whether Congress intended §844(h)(1) to apply to these facts.

Petitioner's reliance on Smith v. United States, 113 S.Ct. 2050 (1993), is unpersuasive. Petitioner argues that the Court's broad construction of "use" in Smith should be applied to §844(h)(1). U.S. Pet. App. at 7. However, petitioner erroneously reasons that Lee "used" fire to commit the felony of "threatening" residents of the Tamarack Apartments. Id, at 8.

Conspiracy is the offense Lee was convicted of under §241. See, e.g., United States v. Guest, 383 U.S. 745, 753 (1966) (construing 18 U.S.C. §241). Proof of a conspiracy under §241 requires proof of an agreement to interfere with the exercise of a federal right. Id.; United States v. Jacobs, 451 F.2d 530, 539 (5th Cir. 1971) (reasoning that the essence of conspiracy is the agreement). Although overt acts may be evidence of an agreement, it is the agreement itself rather than the overt act that is proscribed by §241.

United States v. Mirato, 454 F.2d 167, 169 (5th Cir. 1972).

Assuming there was a conspiracy, the agreement would have been made long before the cross was ignited. See, Hayward, 6 F.3d at 1248, n. 9. (finding that defendant waived this argument because it was raised for the first time on appeal - Lee raised this issue below although the Court did not reach it). No matter how broadly "use" is defined, it is inconceivable that Lee "used" fire "to commit" the crime of conspiracy, as required for conviction under §844(h)(1). Compare Smith, 113 S.Ct. at 2058-59 (construing 18 U.S.C. §924(c)(1), which punishes "use" of a firearm "during and in relation to" a drug offense, broadly to mean there was no accident or coincidence). At most, the burning cross here was evidence of an agreement; it was not the agreement itself. Absent an agreement, there is no felony under §241. Petitioner's reliance on the Court's construction in Smith of entirely different language in a different statute is misplaced.

Moreover, it is inconsistent with the First Amendment to punish the use of fire when that use is solely to express a message. The government's prosecution of Lee under §844(h)(1) is nothing more than an attempt to regulate disfavored speech. Without fire there would be no expressive conduct. Had Lee erected a cross without burning it, the "message" conveyed would have been far different.

Accord Hayward, 6 F.3d at 1247 ("One cannot reasonably argue that merely erecting a wooden cross . . . has the same effect as setting the cross on fire.")

This Petition should be denied because the Eighth Circuit properly construed §844(h)(1) as applying to acts of arson, and not to expressive uses of fire.

3. If the Court is inclined to grant the United States' Petition, it should also grant Bruce Roy Lee's Petition filed on January 4, 1994. By granting certiorari in both cases, the Court can comprehensively consider and resolve the intertwined questions raised by the parties.

The conflict between the Seventh and Eighth Circuits cannot be resolved by considering the Hayward petition alone and holding the Lee Petition in abeyance, as suggested by the Solicitor General. Lee petitioned for a writ of certiorari to resolve whether, as a matter of law based on the facts of his case, he could be convicted for conspiracy under 18 U.S.C. §241 without violating the First Amendment. Lee Pet. App. at i. The Solicitor General herein petitioned for certiorari on the question of whether 18 U.S.C. §844(h) could be applied to a cross burning conspiracy. United States Pet. App. at (I). The Hayward defendants petitioned for certiorari on the question of whether the "non-destructive statement" of a cross burning could be prosecuted under §844(h) as an "act of arson," and whether

42 U.S.C. §3631(b) on its face violated the First Amendment. Hayward Pet. App. at i, 16.

Each of these petitions raises distinct issues relating to different statutes. The Court's consideration of one petition will not resolve the questions raised by the others. As the Hayward court noted, it is "the government's common practice" to charge cross burning cases under the three statutes at issue in these petitions. Hayward, 6 F.3d at 1246, n. 5 (citing six recent cases). The conflict between the Seventh and Eighth Circuits is likely to arise again in the future. If the Court decides to grant any of the petitions, granting all of them or at least those in United States v. Lee, would enable the Court to properly and fully consider the First Amendment questions raised when cross burnings are prosecuted under 18 U.S.C. §844(h).

As argued by Lee below, the application of 18 U.S.C. §844(h) to Lee is due exclusively to his using fire to aid in symbolic expression, a purpose which Congress did not have in mind when the statute was passed. Because burning a cross is a communicative act (indeed, Lee's prosecution was brought precisely as a result of the act's expressive content), the Court should grant Lee's Petition for Certiorari if it is inclined to grant the government's. See, Brandenburg v. Ohio, 395 U.S. 444 (1969) (cross burning protected by First Amendment); R.A.V. v. City of St. Paul,

___ U.S. ___, 112 S.Ct. 2538 (1992) (ordinance banning cross burnings unconstitutional); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning within scope of First Amendment). The issue of whether an enhanced sentence should be imposed for engaging in an expressive act under §844(h) is closely related to the First Amendment issues raised by Lee in his Petition. Section 844(h) cannot be adequately treated without reference to those First Amendment considerations.

4. The Solicitor General is attempting to manipulate the process in this matter to fit his agenda. The Solicitor General admittedly prefers to argue the United States' position based on the facts presented in Hayward. United States Pet. App. at 7. The government prevailed in that case, the facts of which were more egregious in that two separate cross burnings took place on the private property of targeted victims. United States v. Hayward, 6 F.3d 1241, 1244 (7th Cir. 1993). Lee, on the other hand, presents the First Amendment issues more fully as a result of the placement of the cross in an open field and its being directed at the community residing in the apartment complex, factors which would constitute a basis for distinguishing the narrower Hayward holding. The Eighth Circuit holding is also more authoritative as an en banc ruling.

CONCLUSION

The United States' Petition for Writ of Certiorari in this matter should be denied because it is untimely and the issue was properly decided by the Eighth Circuit. In the alternative, this Petition should be consolidated with the Petition of Bruce Roy Lee so that the Supreme Court can comprehensively resolve both the First Amendment and statutory issues raised.

Dated: March 17, 1994

Respectfully submitted,

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REPLY BRIEF FOR THE PETITIONER

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Smith v. *United States*, 113 S. Ct. 2050 (1993)	4, 5
United States v. *Adams*, 383 U.S. 39 (1966)	4
Washington v. *Confederated Tribes*, 447 U.S. 134 (1980)	3
Constitution, statutes and rule:	
U.S. Const. Amend. I	1
18 U.S.C. 241	4
18 U.S.C. 844(h)	1
18 U.S.C. 844(h)(1)	4
Sup. Ct. R. 13.4	1, 2, 3
Miscellaneous:	
R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993)	2

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1276

UNITED STATES OF AMERICA, PETITIONER

v.

BRUCE ROY LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent argues (Br. in Opp. 4-6) that the petition for certiorari is untimely because it was not filed within 90 days after the court of appeals order of August 14, 1991.[1] However, the text of Supreme Court Rule 13.4,

[1] The court of appeals panel entered its judgment on June 10, 1991, affirming respondent's conspiracy conviction under Count I but reversing his conviction under Count III for violation of 18 U.S.C. 844(h). Respondent filed a timely petition for rehearing with suggestion for rehearing en banc, contending that the panel had erred in rejecting his First Amendment challenge to his conviction on Count I. The United States opposed the petition but asked the court of appeals to review the panel's reversal of the Count III conviction if it decided to rehear the case. Lee Pet. App. A4. On August 14, 1991, the Eighth Circuit granted rehearing en banc "as to Count I only" and vacated the panel opinion and judgment "as it pertains to Count I." Lee Pet. App. A18. The judg-

the precedents of this Court, and sound principles of judicial administration all indicate that the petition was timely filed.

a. Rule 13.4 of the Rules of this Court states that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." In the present case the court of appeals granted rehearing en banc and entered a "subsequent judgment" in the case on October 7, 1993. Pursuant to Rule 13.4, the time for any party to file a petition for certiorari runs from that date.[2]

b. As this Court's precedents make clear, this analysis is not altered by the fact that the grant of rehearing did not encompass the issue raised in the government's

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ment of the court of appeals on rehearing en banc was entered on October 7, 1993. The government's petition for a writ of certiorari is addressed to the panel's June 10, 1991, ruling with respect to Count III of the indictment. See Pet. 5-6 n.2. For the reasons stated *infra*, we believe that the time for filing a petition for certiorari runs from October 7, 1993, the date of the "entry of a subsequent judgment," Supreme Court Rule 13.4, by the en banc court of appeals.

[2] Rule 13.4 expressly provides that the filing of a rehearing petition by one party shall toll the time for all parties to seek review in this Court. We assume (and the text of the Rule gives no reason to doubt) that this principle applies "regardless of whether the other parties would raise the same or different issues as raised in the petition for rehearing." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 286 (7th ed. 1993). If so, there is no reason that tolling should stop when a court of appeals determines to rehear an aspect of the case en banc but before it has entered a judgment on rehearing.

petition for certiorari. In *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), the Court considered the analogous question "whether a motion for partial new trial renders nonfinal the District Court's holding on *all* issues between the parties, or merely renders nonfinal the disposition of those issues actually raised in the new trial motion." 447 U.S. at 149. The Court concluded that "the filing of a motion for partial new trial in these circumstances must have rendered nonfinal the disposition of all issues between the parties," *id.* at 150, and that the time for filing a direct appeal to this Court was therefore tolled during the pendency of that motion. See also *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990).[3]

c. Finally, to interpret Rule 13.4 in the manner that respondent suggests would disserve this Court's interest in sound judicial administration. A rule that would force litigants to seek review in this Court while other aspects of the case were pending in the court of appeals "would serve no useful purpose," *Confederated Tribes*, 447 U.S. at 150, but instead would perversely encourage piecemeal litigation.[4] Nor is there merit to respondent's

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[3] Our construction of Rule 13.4 is also consistent with the principle that "[a] petition for writ of certiorari can expose the entire case to review." *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). Thus, a petition for certiorari to review a court of appeals judgment can bring before this Court issues decided at a prior stage of the litigation—including earlier rulings that might have been (but were not) reviewed by this Court when they were issued. See *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365-366 n.1 (1973).

[4] Alternatively, respondent's interpretation of Rule 13.4 could encourage parties seeking rehearing in the court of appeals on one issue to seek rehearing on other issues as well solely to preserve their right to petition for review in this Court. See *Confederated Tribes*, 447 U.S. at 150.

suggestion that the government "could have avoided 'splitting' the case by making a motion to stay the appellate court proceedings while it made a timely petition to the United States Supreme Court." Br. in Opp. 5-6. There is no assurance that the court of appeals would have granted such a motion, and it is not clear that this Court could have exercised its certiorari jurisdiction under these circumstances. See *Jenkins*, 495 U.S. at 46 ("while the petition for rehearing is pending, there is no 'judgment' to be reviewed"). In any event, this Court's decision whether to review one aspect of a case can most intelligently be made after the court of appeals has resolved all outstanding issues.[5]

2. In our petition for a writ of certiorari in this case, we recommended that the petition be held pending disposition of the petition for certiorari filed in *Hayward* v. *United States*, No. 93-1063. In the alternative, we suggested that the Court grant the petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993). On March 28, 1994, the Court denied the petition for certiorari filed in *Hayward*. We therefore suggest that the

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[5] To interpret Rule 13.4 in the manner that respondent suggests would be particularly inadvisable in cases such as the present one. Respondent's conviction under Count III for violation of 18 U.S.C. 844(h)(1) is "inextricably linked," *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966), to his conviction under Count I for conspiring to threaten or intimidate individuals in their exercise of federally guaranteed rights in violation of 18 U.S.C. 241. Section 844(h)(1) provides a penalty for those who have used fire in the commission of a federal felony; in this case the federal felony is Section 241. Thus, until the court of appeals rendered its final judgment on Count I, any review of the panel's judgment on Count III would have been premature.

petition in this case be granted, the judgment of the court of appeals panel be vacated as to Count III of the indictment, and the case be remanded for further consideration in light of *Smith*.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, we suggest that the Court grant the petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1994